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Marital Conflict Mediation and Post-Separation Wife Abuse

Desmond Ellis*

The primary objective of this paper is to identify individual, couple (relational), and situational factors which increase the likelihood of post-separation abuse of women who participate in the informal marital conflict resolution process known as mediation. The four factors identified as risk markers for post-separation violence are power differences, pre-separation violence, privacy norms, and alcohol and drug abuse. Each of these may be subsumed under one or other of the four types of variables entering into Megargee's "algebra of aggression."

Introduction

Marital conflicts ending in separation and divorce are a "growth industry."¹ Expanding equally as quickly is the marital conflict resolution industry.² Within this industry, the informal conflict resolution process known as mediation³ is growing especially rapidly,⁴ disclosing many advantages and disadvantages.⁵

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1. See generally Graham B. Spanier, *Married and Unmarried Cohabitation in the United States: 1980*, 45 J. Marriage & Fam. 277 (1983) (March 1980 Current Population Survey data used, in part, to show changes between 1975 and 1980 in demographic characteristics pertaining to married and unmarried couples). See also Statistics Canada, *Marrying and Divorcing: A Status Report for Canada* (Oct. 1988).

2. The marital conflict resolution industry includes those formal (legal) and informal institutions and agencies involved in the process of resolving marital conflicts. Settlements, orders, contracts, and decisions are the outcomes or "products" of these institutions and agencies. Adjudication, arbitration, mediation, and conciliation are included among the means used to produce the outcomes referred to above.

The industry itself is divided into two fields: the traditional, adversarial, formal-legal field, whose practitioners are lawyers and judges; and the "alternative dispute resolution field" whose modal practitioners, mediators and conciliators, seek "the informal and prompt resolution of disputes." Alan Dranitzke, *Legally Speaking: Federal ADR*, Mediation Rep., March 1989, at 2.

3. See Dean G. Pruitt & Jeffrey Z. Rubin, *Social Conflict: Escalation, Stalemate, and Settlement* 166 (1986).

4. See Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 Harv. Women's L.J. 57, 68 (1984).

One major disadvantage, according to mediation critics, is the link between marital mediation and continuing physical harm to wives who participate in mediation.⁶ Specifically, critics contend that, in a variety of ways, mediation facilitates aggression against wife-participants by the male spouses from whom they are separating or are separated.⁷

The primary purpose of this paper is to identify four factors which, in Megargee's theory of aggression,⁸ have the status of risk markers⁹ for violence generally and violence against separated women in particular. The presence of these markers in married or cohabiting couples should serve as a warning signal to the counselors and other professionals who interact with them that woman abuse may be present in the relationship and that mediation would be a debilitating means of resolving the couple's problems.

Marital Status and Wife Abuse

Some time ago, Murray Straus suggested that "the marriage license [was] a hitting license."¹⁰ Accepting this as true, then one solution to the problem of woman abuse is for wives to separate from their husbands. Some abused wives do this;¹¹ those who do not may stay with the husbands who beat them because, as Okun

5. See Pruitt & Rubin, *supra* note 3, at 179-82. For an historical review of mediation in Canada, see Audrey Devlin & Judith P. Ryan, *Family Mediation in Canada: Past, Present, and Future Developments*, 11 *Mediation Q.* 93 (1986).

6. Linda Girdner, *Mediating Divorce in the Shadow of Violence* 9, 10 (paper presented at the Academy of Family Mediators Meeting, New York, July 1987). See also Lerman, *supra* note 4, at 86-87 (noting that mediated agreements may inadvertently make woman abuse more probable by tacitly legitimating male violence against female partners who fail to live up to the terms of the agreement); Dianna R. Stallone, *Decriminalization of Violence in the Home: Mediation in Wife Battering Cases*, 2 *Law & Inequality* 493, 511 (1984) ("Mediation methods are dangerous because they fail to deter future life-threatening abuse. . . . [T]hey also fail to communicate to the abuser that his conduct is wrong.").

7. Lerman, *supra* note 4, at 83-87; Stallone, *supra* note 6, at 510-17.

8. Edwin I. Megargee, *Psychological Determinants and Correlates of Criminal Violence*, in *Criminal Violence* 81 (Marvin E. Wolfgang & Neil Alan Weiner eds. 1982).

9. A risk marker is any attribute or experience of the abuser, the victim, or the couple which increases the likelihood of abuse above the level of chance. For an example of research on risk markers for woman abuse, see Gerald T. Hotaling & David B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 1 *Violence & Victims* 101 (1986).

10. Murray A. Straus, *The Marriage License as a Hitting License: Evidence from Popular Culture, Law, and Social Science*, in *The Social Causes of Husband-Wife Violence* 39, 40 (Murray A. Straus & Gerald T. Hotaling eds. 1980).

11. See Desmond Ellis, *Male Abuse of a Married or Cohabiting Female Partner: The Application of Sociological Theory to Research Findings*, 4 *Violence & Victims* 235 (1989).

has noted, "even if she doesn't stay, he may keep showing up."¹² When ex-husbands show up, the results can be lethal. Estrangement is implicated in a significant proportion of "deadly quarrels" between husbands and wives, cohabitators, and lovers.¹³ Separated and divorced women are also disproportionately represented among victims of rapes and assaults.¹⁴ In a significant number of cases, their rapists and assailants are ex-partners, and the violence occurs during or after the process of separation.¹⁵

In this connection, Serum considers the abuser to be "most dangerous" at these times.¹⁶ Other research indicates that violence against wives is associated with the *transition* from one marital status (married) to another (separated/divorced).¹⁷ A key factor in this transition is the kind of marital conflict resolution process in which the couple becomes involved.¹⁸

12. Lewis Okun, *Woman Abuse: Facts Replacing Myths* 43 (1986).

13. See Gwynn Nettler, *Killing One Another* 108-20 (1983).

14. Bowker's perusal of National Crime Survey data reveals that "compared with married women, separated or divorced women are about six times as likely to be raped or robbed, [and] five times as likely to be assaulted . . ." Lee H. Bowker, *Women as Victims: An Examination of the Results of L.E.A.A.'s National Crime Survey Program*, in *Women and Crime in America* 158, 164-65 (Lee H. Bowker ed. 1981).

15. Giles-Sims reports that 44% of women in shelters were abused by their spouses after they had left them. Jean Giles-Sims, *Wife Battering: A Systems Theory Approach* (1983) (cited in Linda MacLeod, *Battered But Not Beaten: Preventing Wife Battering in Canada* 20 (1987)). The Solicitor General of Canada found most of the assaults against women who were separated from their spouses were committed by a spouse (34%) or ex-spouse (20%). Solicitor General of Canada, *Canadian Urban Victimization Survey: Female Victims of Crime* 4 (1985) (bulletin). United States Department of Justice researchers report that "spouses or ex-spouses committed two-thirds of the violent crimes by relatives against women." United States Department of Justice, *Violent Crime by Strangers and Non-Strangers* 2 (January 1987) (special report).

16. Okun, *supra* note 12, at 81 (citing Camella S. Serum, *Battered Women and Batterers* (lecture presented at the Hoyt Conference Center, Eastern Michigan University, Ypsilanti, Michigan, May 9, 1979)).

17. Desmond Ellis & Walter DeKeseredy, *Marital Status and Woman Abuse: The DAD Model*, — *Int'l J. Soc. Fam.* — (forthcoming); Judith Wallerstein & Joan Kelly, *Surviving the Breakup* 28-30 (1980).

18. See Desmond Ellis, *Post-Separation Woman Abuse: The Contribution of Lawyers as "Barracudas," "Advocates," and "Counsellors,"* 10 *Int'l J. L. & Psychiatry* 403, 408-10 (1987) [hereinafter *Contribution of Lawyers*]; Kenneth Kressel, Martin Lopez-Morillas, Janet Weinglass & Morton Deutsch, *Professional Intervention in Divorce: The Views of Lawyers, Psychotherapists, and Clergy*, in *Divorce and Separation: Context, Causes and Consequences* 246 (George Levinger & Oliver C. Moles eds. 1979) [hereinafter *Professional Intervention*]. The authors note that couples who negotiate directly with each other in the presence of a mediator are likely to experience fewer post-separation problems than couples who have lawyers to represent them. Role strain and an adversarial legal system are partly responsible for the relative ineffectiveness of formal, legal intervention in the divorce process. *Id.* See also Robert S. Weiss, *Marital Separation* 254-77 (1975).

"Lawyering" Marital Conflicts: Mediators' Critiques

If strictly legal expenditures are used as an indicator, it is obvious that most separating couples hire lawyers to negotiate solutions to marital conflicts over property, ongoing financial support, and child custody and visitation.¹⁹ According to many writers who support mediation as an alternative marital conflict resolution process, the attributes of the formal legal system, including its practitioners, tend to make life worse for separating/divorcing spouses and their children.²⁰

First and foremost, the legal system's adversarial nature requires lawyers to play the role of warriors whose primary objective is winning for their clients.²¹ This tends to convert conflicts which may have been solved with gains to both parties and their children (positive-sum conflicts)²² into conflicts in which one spouse's gain is the other's loss (zero-sum conflicts).²³ Feelings of antagonism tend to be more strongly associated with zero-sum than with positive-sum conflicts.²⁴ Thus, adversarial resolution of marital conflicts, according to supporters of mediation, increases animosity between the parties.²⁵

19. See Daniel Camozzi, *Divorce Mediation*, Therapy Now, Spring 1985, at 20.

20. See Jay Folberg & Alison Taylor, *Mediation: A Comprehensive Guide for Resolving Conflicts Without Litigation* 33-36 (1984); Joan B. Kelly, *Mediated and Adversarial Divorce: Comparisons of Client Perceptions and Satisfaction* (proceedings, Family Mediation: The Second Annual Conference, Banff, Alberta, 1987); Law Reform Commission of Canada, *Report on Family Law* 16 (1976).

21. See O.J. Coogler, *Changing the Lawyer's Role in Matrimonial Practice*, Conciliation Cts. Rev., Sept. 1977, at 1; H.H. Irving & B.B. Irving, *Conciliation Counseling Divorce Litigation*, 16 Rep. Fam. L. 257 (1974); Jessica Pearson & Nancy Thoennes, *Custody Mediation in Denver: Short and Longer Term Effects*, in *The Resolution of Family Conflict: Comparative Legal Perspectives* 248, 249 (John M. Eekelaar & Sanford N. Katz eds. 1984).

22. These concepts are taken from game theory. In a zero-sum, two person game, whatever one player wins, the other loses and vice versa. In a positive-sum game, a win for one player does not entail a corresponding loss for the other player. Both may be better off, albeit not equally. An exchange relationship (e.g., money for goods) is an example of a positive-sum relation. Most wars which are won by one side are zero-sum games. See generally Abraham Kaplan, *Mathematics and Social Analysis*, in *Game Theory and Related Approaches to Social Behavior* 81 (Martin Shubik ed. 1964).

23. For a critical discussion of both kinds of conflicts, see P.H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* 148-50 (1979).

24. See *id.* at 180-81; Coogler, *supra* note 21, at 1-2.

25. *Professional Intervention*, *supra* note 18, at 250 ("[T]he law's formal bias, the availability of legal threats and counter-threats, as well as the emotional agitation of clients, may push even the most cooperative of lawyers toward serious escalation of conflict."); Frontenac Family Referral Service, *Couples in Crisis II: The Kingston Mediation Model 2* (1984) ("The adversarial process pits one partner against the other and often has the undesirable effect of exacerbating those attitudes and feelings which contributed to the marriage breakdown.") [hereinafter *Crisis II*].

Second, because of the coercive nature of the system, the parties are more likely to evade, than to comply with, agreements or settlements which adjudication produces.²⁶

Third, Rifkin contends that a "male ideology of law," that is, a legal system characterized by a "patriarchal paradigm," "hierarchy," and "combat," constitutes a traditional male jurisprudence which helps maintain male dominance when divorcing couples involve lawyers and judges in the process of marital dispute resolution.²⁷ Involvement in the formal legal system subordinates female concerns with "responsibility and justice" and female reliance on subjectivity as a method to male notions of the "reasonable man," "rationality," "hierarchy," winning, and male reliance on objectivity as method.²⁸ In sum, women should avoid "lawyering" and adjudication and embrace mediation because "mediating disputes reflects feminist jurisprudential differences from the male ideology of law"²⁹ which are oriented towards "a new relation between life and law,"³⁰ a relation characterized by greater equality between men and women. The outcomes or "settlements" of mediation will reflect this newer, more equal male/female relationship.³¹

Fourth, a number of scholars and mediators allege that adjudication is inappropriate when it is applied to resolve disputes of couples who are involved in emotional, intimate, established, multiplex relationships in which dependent children are often implicated.³² Alternative dispute resolution processes such as mediation are more appropriate because mediators are less likely than adjudicators or lawyers to be concerned with the legal objective of rule maintenance, less likely to see things in black/white terms with respect to rules, more likely to compromise, more likely to take

26. See Crisis II, *supra* note 25, at 2. See also Annemette Sorensen & Maurice MacDonald, *Does Child Support Support the Children?*, 4 Children & Youth Services Rev. 53, 55 (1982) (noting the general problem of non-compliance with child support orders).

27. Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 Law & Inequality 21 (1984).

28. See *id.* at 23, 24.

29. *Id.* at 23.

30. *Id.* at 23 (citing Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 645 (1983)).

31. See *id.* at 30-31.

32. Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 Mediation Q. 3, 9-10 (1983) ("Divorce is a multifaceted experience that combines emotional, legal, and family processes. The strong emotional forces accompanying the dissolution of an existing family relationship require measures more delicately wrought than those that can be provided in a court-imposed solution."). See also Max Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia* 396 (1967); Gulliver, *supra* note 23, at 14-15.

the trouble to learn what the normative expectations, interests, and emotions of the contending partner are, and more likely to structure couple-solutions to problems with these factors in mind.³³

Finally, litigation is not only less civilized than mediation, it is also more costly, both emotionally and economically.³⁴ Notwithstanding these qualifications, the alleged defects of the family law system have led, in recent years, to the use of mediation as an alternative conflict resolution process.³⁵

Taken together, a perusal of these mediation-biased criticisms of lawyer negotiation, litigation, and adjudication yields the following general conclusions. First, the criticisms tend to be stated in ways that are uncharacteristic of the professional mediator's approach to conflict in general and lawyer/mediator conflicts in particular. Specifically, the critics seem to be as interested in "winning over" an audience to their professional orientation as they are in either mediating their own conflicts with lawyers or in displaying a willingness to compromise, a willingness to convert zero-sum professional conflicts into positive-sum (mutual gains) conflicts.

Second, the criticisms tend to be stated in rather general, dichotomous, black/white terms. Thus, mediators routinely take the time and trouble to obtain information on their clients' expectations, interests, and emotional states, but lawyers—or negotiators for their own clients—do not. As Gulliver points out, however, there is nothing inherent in negotiation which vitiates any attempt lawyers make to do these things or to learn how to do them.³⁶ In addition, a number of lawyers are also mediators who, in providing legal information, provide information that is "general and impartial" as compared with legal advice which "involves a specific suggestion to pursue or refrain from a particular course of conduct and, therefore, constitutes a form of representation."³⁷

Third, one is told in rather explicit terms that the family law system is inappropriate for dealing with emotionally intense, multiplex relations of separating and divorcing couples. Implicitly, one is led to believe that mediation is appropriate for such conflicts.

33. Gulliver, *supra* note 23, at 14-15.

34. See Donald W. Lindholm, *The Mediation Succeeds, the Mediation Fails: What Do You Owe Each Party?*, *Fam. Advoc.*, Winter 1987, at 14, 15-16; Pearson & Thoennes, *supra* note 21, at 249.

35. See Devlin & Ryan, *supra* note 5, at 93; Folberg, *supra* note 32, at 6.

36. Gulliver, *supra* note 23, at 15.

37. Lawrence D. Gaugan, *Divorce Mediation: A Lawyer's View*, *Fam. Advoc.*, Summer 1986, at 34-35.

Are there no marital conflicts for which lawyer negotiations, litigation, and adjudication are appropriate? Conversely, is mediation appropriate and risk-free for every kind of marital dispute?

Fourth, to equate the extant family law system with patriarchy and mediation with feminism is to provide a parsimonious but misleading characterization of the two kinds of dispute resolution systems. In my own experience as a client of mediation, as one who experienced litigation and adjudication, as a person who has played the role of "wife abuser" before an audience of professional mediators,³⁸ and as an academic who has studied the topic, mediation has no obvious greater autonomy from its male-dominated societal context than does negotiation and litigation. Both tend to reproduce, rather than contest, male domination. Indeed, where violence against the wife is present, the formal legal system is likely to take a more feminist (stop the violence) stance than is mediation.

Fifth, mediation is not routinely less costly, emotionally or economically, than negotiation involving lawyers. Couples pay an additional emotional price for bungled mediation³⁹ just as they do for bungled negotiations. The contention that mediation is economically less costly than lawyer negotiations is either not supported by research findings⁴⁰ or supported by findings which show that it is more economical for men than for women.⁴¹

Mediation as an Alternative

As a marital conflict resolution process, mediation is characterized by self-help, informality, compromise, identification of underlying causes, and impartial, third party facilitation of communication.⁴² Mediated agreements by their nature constitute

38. North American Conference on Peacemaking and Conflict Resolution, Montreal, Canada, March 1989. Lisa Lerman played the abused wife and Linda Girdner mediated.

39. See Gaugan, *supra* note 37, at 35.

40. C. James Richardson, *Court-Based Divorce Mediation in Four Canadian Cities: An Overview of Research Results* 40 (1988).

41. *Id.*

42. Janet Rifkin offers the following "highlights [of] some of the main contrasts between adjudication and the practice of mediation": public vs. private, formal vs. informal, strict rules of evidence vs. no formal rule parameters, conflict vs. consensus, win/lose vs. compromise, decisions vs. agreements, rule oriented vs. person oriented, representation by lawyer vs. direct participation. Rifkin, *supra* note 27, at 25-26. See also William L.F. Felstiner & Lynne A. Williams, *Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations*, 2 *Law & Hum. Behav.* 223, 234 (1978); Folberg & Taylor, *supra* note 20, at 26-36; Ontario Association for Family Mediation, *Code of Ethics*, in Ontario Association for Family Mediation, *Directory of Family Mediators in Ontario* ii (1986) [hereinafter Ontario Association]; Pearson & Thoennes, *supra* note 21, at 249-50.

agreements reached by the parties themselves; they are "privately ordered."⁴³ Each party takes personal responsibility for the agreement and, therefore, each party is more likely to abide by its terms.⁴⁴ This contributes markedly to a post-separation life characterized by separate but peaceful co-existence.⁴⁵

The same outcome obtains *during* the process of mediation because the process itself focuses on the underlying causes of incompatibility. Primary mediation tools include cooperation, compromise, and development of a belief by the couple that the locus of control lies with them.⁴⁶ Under these conditions, mediation produces "improved spousal relations" between ex-spouses.⁴⁷ Thus, mediation appears to be a superior method of conflict resolution, particularly in terms of the parties' emotional stability and welfare.⁴⁸

A review of the empirical research results which allegedly support this rather optimistic conclusion, however, yields two less sanguine findings.⁴⁹ First, mediation may have benign post-separation/divorce consequences for some couples under some circumstances and less benign consequences for other couples under the same or different circumstances.⁵⁰ Second, as a professional group, mediators tend to avoid thinking theoretically about, or doing empirical research on, the relationship between mediation and wo-

43. See Robert H. Mnookin, *Divorce Bargaining: The Limits of Private Ordering*, in *The Resolution of Family Conflict: Comparative Legal Perspectives* 364 (John M. Eekelaar & Sanford N. Katz eds. 1984). According to Mnookin, "private ordering" refers to a legal framework in which couples themselves have "great freedom" to determine their "postdissolution rights and responsibilities." *Id.* Mnookin draws a contrast between private ordering and a legal framework to which the external regulation of post-dissolution rights and responsibilities is central. The latter, he says, has given way to the former. *Id.*

44. Crisis II, *supra* note 25, at 1-7.

45. *Id.*

46. See Folberg, *supra* note 32, at 9-10.

47. Pearson & Thoennes, *supra* note 21, at 258. See also Howard H. Irving & Michael Benjamin, *A Study of Conciliation Counselling in the Family Court of Toronto: Implications for Socio-Legal Practice*, in *The Resolution of Family Conflict* 268 (John M. Eekelaar & Sanford N. Katz eds. 1984).

48. For a review of the advantages and disadvantages of informal justice, see 1 *The Politics of Informal Justice: The American Experience* (Richard L. Abel ed. 1982).

49. Here it is relevant to note that the "fundamental issues" currently facing mediation are defined not in terms of providing theory and more valid and reliable research results on the specific kinds of issues or conflicts for which mediation is most effective, but in terms of professional matters having to do with "[c]redentials, licensing, confidentiality and the availability of full-time paid employment . . ." Roger Lesser, *Alternative Dispute Resolution: A Crossroads*, *Mediation Rep.*, March 1989, at 1.

50. See *infra* notes 74-76 and accompanying text.

man abuse.⁵¹

Research: Effects of Mediation on Spousal Relations

Supporters of mediation tend to refer to a relatively small number of empirical studies which clearly demonstrate to them the advantages of mediation over negotiation and/or litigation involving lawyers, courts, and judges. One of the best designed of these, the Denver Mediation Study conducted by Pearson and Thoennes, is frequently cited for its findings and conclusions (presented together with relevant study design/analysis details in their Table 16.1).⁵² This table shows that couples who signed a separation agreement (the successful mediation group) were more likely to report friendly or less hostile relationships with their ex-partners than couples who chose adjudication.⁵³ Pearson and Thoennes' Table 16.1 does *not* relate any information about the process of mediation and the relationship between mediation and improved spousal relations.

If mediation works the way the Denver Mediation Study authors describe it, then within-group differences between the two mediation samples should be less than the differences *between* the two mediation and the two lawyer/court samples. Contrarily, Pearson and Thoennes report that the differences in the percentages reporting "no worse than 'strained' relations" *within* the two groups of mediating couples are greater than the differences between the mediation and the two lawyer couple groups!⁵⁴ Specifically, the percentages reporting "no worse than 'strained' relations" for the successful and unsuccessful mediation groups are 81% and 50% respectively; for the two lawyer-only groups, "Control" and "Rejecting," the comparable percentages are 41% and 45%.⁵⁵ The mean for the mediation group is 65%; the percentage difference is 31%.⁵⁶ The comparable percentages for the lawyer-only groups are 43% and 4%.⁵⁷ The difference between the mediation and lawyer-only groups is 22%. An analysis of variance on these groups would almost certainly reveal a statistically non-significant association between mediation and lawyer effects on re-

51. See *infra* notes 63-67 and accompanying text.

52. Pearson & Thoennes, *supra* note 21, at 256.

53. *Id.*

54. *Id.*

55. *Id.*

56. See *id.*

57. *Id.*

ported spousal relations.⁵⁸

Further, of the 125 couples who began as participants in mediation, approximately one-half ($n=63$) did not successfully complete the process.⁵⁹ Pearson and Thoennes provide no explanation for this anomaly. Other research indicates that angrier couples are less likely to enter into and/or successfully complete mediation.⁶⁰ This finding suggests that couples in the successful mediation group more frequently reported less hostile relations than couples in the other groups simply because the couples who successfully mediated were less angry to begin with.⁶¹

Taken together, these two considerations raise serious questions about the internal validity of Pearson and Thoennes' finding that mediation has benign effects on post-separation relations between spouses. Their study remains, in terms of its design (field experimental/longitudinal) and relatively large sample size, the best research done to date on the effects of mediation. Nevertheless, intensive analysis reveals that the association between mediation and improved spousal relations is ambiguous in the Pearson and Thoennes study. The few other, less sophisticated studies that have been published do not appear to be any less ambiguous.⁶²

58. This kind of statistical analysis involves comparing within-group variations with between-group variations.

59. Pearson & Thoennes, *supra* note 21, at 256.

60. See Stephen J. Bahr, C. Bradford Chappell & Anastasios C. Marcos, *An Evaluation of a Trial Mediation Program*, 18 Mediation Q. 37, 41 (1987).

61. Pearson and Thoennes did introduce a number of control variables in an attempt to eliminate several rival hypotheses. However, they do not appear to have controlled on initial differences in anger. See Pearson & Thoennes, *supra* note 21, at 260-62. If Kressel, et al. are correct, their failure to control on the "emotional reactivity" of couples and on their knowledge of "bargaining, substance and procedure" raises serious doubts about the finding of a positive association between successful mediation *per se* and improved spousal relations. See *Professional Intervention*, *supra* note 18, at 270.

62. For example, in the Wheeler study, voluntary agreements and court orders were compared with respect to regularity of support payments, but the number of voluntary agreements that were mediated is not given. Michael Wheeler, *Separation and After: Implications for Policy and Practice* 18 (1980). In any event, the author found "no evidence that voluntary agreements are more likely to be honoured than court orders. . . . The amount and regularity of payments would appear to depend . . . on the ability to pay." *Id.*

The Frontenac Family Referral Service study of post separation violence did not involve systematic comparisons between clients randomly assigned to mediated and non-mediated cases. Crisis II, *supra* note 25, at 15-17, 35-40. In the Attorney General of Ontario Report on the effects of court based mediation on "future court appearances," similar data on non-mediated cases were not collected. Ministry of the Attorney General Research Services, *Evaluation of Mediation Services: Preliminary Report* 18 (1986). The Kressel, et al. study on post-divorce adjustment is based on the intensive analysis of only nine cases. *Professional Intervention*, *supra* note 18, at 269. These couples were precisely the kind of couples for whom mediation is most likely to be effective, i.e., articulate, knowledgeable, middle-class couples. Yet,

One shared attribute of studies conducted by supporters of mediation, including Pearson and Thoennes, is an apparent unwillingness to examine or even to discuss the problem of wife abuse in the context of mediating marital conflicts. A review of all issues of *Mediation Quarterly*, the major outlet for mediation theory, research, and practice, reveals that the journal has not published one theoretical or research article specifically on mediation and wife abuse since its inception in 1983.⁶³ A perusal of the indices of all issues reveals only one reference to woman abuse.⁶⁴ There is only one reference in the indices to either violence or aggression.⁶⁵ Despite the fact that violence and abuse are part of the history and the future of a significant number of separating and divorcing women,⁶⁶ these ways of behaving and the effects of mediation upon them appear not to be theoretically or socially significant enough to warrant theory and research on the topic.⁶⁷

This lack of empirical data means that counsellors and clergy recommend mediation as an appropriate means of conflict resolution for couples where the wife has been (or is being) abused based on criteria other than the effects of mediation on abuse. These include ideology, professional self-interest, and unsystematically collected data drawn from practical experience. For one or more of these reasons, the State of New York and the chief police prosecutor in Cleveland, Ohio, believe that wife abuse cases can be successfully mediated,⁶⁸ while the National Center on Women and Family Law and the PINS Mediation Project of New York believe

the results are inconsistent, five being "enthusiastic" and the remaining four being either unenthusiastic or disagreeing about the value of mediation. These results suffer from the fact that an analysis of only nine cases produces unreliable results. *Id.*

63. One article does, however, address the issue of mediation and abusive couples although not in gender-specific terms. See Dennis Marthaler, *Successful Mediation with Abusive Couples*, 23 *Mediation Q.* 53 (1989). One reason for this state of affairs may be the mediator's preference for the mediated agreement itself as the major outcome or effectiveness variable. Thus, Pearson and Thoennes consider "successful" those clients who reach an agreement in mediation. Pearson & Thoennes, *supra* note 21, at 256-57. Had the wife been assaulted by her ex-spouse six months after the agreement was signed, they would, presumably, still be included among the successes.

64. See Albie M. Davis & Richard A. Salem, *Dealing with Power Imbalances in the Mediation of Interpersonal Disputes*, 6 *Mediation Q.* 17, 22-23 (1984).

65. Kenneth Cloke, *Date Rape and the Limits of Mediation*, 21 *Mediation Q.* 77 (1988) (addressing the issue of whether mediation should be attempted concerning allegations of violence). See *Mediation Q.*, Nos. 1-23 (1983-1989). Key words used in the search were "abuse," "aggression," "assault," "battering," and "violence."

66. See Ellis, *supra* note 11.

67. In this connection, one should note that violence against separating and separated women by their ex-partners was not included as a consequence of the "private ordering" of divorces by Mnookin. See Mnookin, *supra* note 43.

68. Davis & Salem, *supra* note 64, at 22.

that mediation is not appropriate in such cases.⁶⁹

Tentative empirical support exists for the latter position, that abused women should not become involved in mediation.⁷⁰ Among women who reported being abused during their marriages, researchers found that those who engaged lawyers were less likely to report post-separation abuse by their ex-partners than those who participated in mediation.⁷¹ As this was an exploratory study, caution should be exercised concerning its internal and external validity. However, a follow-up study involving court-based mediators yielded similar results.⁷² Specifically, for abused women, lawyer intervention correlated more strongly with decreases in post-separation abuse than did mediator involvement.⁷³ The correlation, it should be noted, was modest.

Risk Markers, Mediation, and Wife Abuse

A risk marker may be defined as any individual, couple (relational), or situational attribute that increases the probability of wife abuse among couples participating in the process of mediation.⁷⁴ A perusal of the feminist literature on modes of marital conflict resolution and their relation to woman abuse identifies power imbalances, pre-separation violence, privacy norms, and the presence of alcohol as risk markers for wife abuse among couples participating in mediation.⁷⁵ The status of these four factors as risk markers for physical abuse derives from the fact that each of them can be subsumed under four classes of variables entering into Megargee's general explanation of violent behaviour.⁷⁶

69. *Id.* Jay Folberg, one of mediation's more prominent scholars, does deal with the appropriateness of mediation where the wife has been abused, but he does not base his advice on cited theory or research. Folberg & Taylor, *supra* note 20, at 185.

70. Desmond Ellis & Lori Wight, *Post-Separation Woman Abuse: The Contribution of Lawyers*, — Victimology — (forthcoming).

71. *Id.* at —.

72. Desmond Ellis, Judy Ryan & Alfred Choi, Lawyers, Mediators and the Quality of Life Among Separated and Divorced Women 35-39 (report prepared for the LaMarsh Research Programme on Violence and Conflict Resolution, York University, North York, Ontario, 1987) [hereinafter Quality of Life].

73. *Id.*

74. For research on risk markers for woman abuse generally, see Hotaling & Sugarman, *supra* note 9.

75. See Jocelynn A. Scutt, *The Privatisation of Justice: Power Differentials, Inequality, and the Palliative of Counselling and Mediation*, 11 Women's Studies Int'l Forum 503 (1988); Mildred Daley Pagelow, *Divorce Mediation and Family Violence*, in Newsletter of the California Council on Family Relations (1985); Ministry of the Attorney General, Ontario, Report of the Attorney General's Advisory Committee on Mediation in Family Law 74-80 (1989) (Ontario Women's Directorate objections to mediation in the presence of wife abuse) [hereinafter Report on Mediation in Family Law].

76. Megargee, *supra* note 8, at 128-58.

Following Megargee, four factors enter into the algebra of wife abuse.⁷⁷ These are: (1) the instigation to aggression (the sum of all factors motivating a husband to hit or hurt his wife); (2) habit strength (choosing aggressive ways of relating to his wife because aggression has, in the past, been a reliable way for the husband to control or get what he wants from children, animals, strangers, and/or his wife); (3) inhibitions against aggression (the sum of all factors motivating the husband to control the overt expression of aggression toward his wife); and (4) stimulus factors (situational factors that increase or facilitate the overt expression of aggression by the husband toward his wife).⁷⁸

All empirical associations between any variable and violent behavior can be subsumed under one or other of Megargee's four variables.

Power Differences

According to Gulliver, "the interaction between the disputants prior to entering the public domain [e.g., mediation], becomes . . . part of, and blends into, the burgeoning [dispute resolution] process."⁷⁹ Central to the *outcomes* of mediation⁸⁰ (apart from mediated agreements) is the concept of "persuasive strength."⁸¹ The process of mediation, as well as its real life outcomes, is influenced by the relative persuasive strengths of the disputing parties.⁸² These strengths are, in turn, a function of each party's potential power.⁸³ Power connotes the ability of each disputant to get what each wants, to stop the other from getting what he/she wants, or to obtain outcomes both want, regardless of the support or opposition of the other.⁸⁴

The potential power of each disputant is a function of the resources each party brings to mediation.⁸⁵ Resources refer both to

77. *Id.*

78. *Id.*

79. Gulliver, *supra* note 23, at 273.

80. Outcomes or results are tentative. Settlements connote finality. "Outcomes," says Gulliver, "vary tremendously in their degree of settlement and, in any case, it is generally impossible to know this until some time after the negotiations are over." *Id.* at 78-79.

81. Persuasive strength refers to potential power resources (e.g., coercive, economic, normative) that are effectively mobilized during the course of the interactional dispute resolution process. *See id.* at 200-05.

82. *See id.* at 200-07.

83. *See id.* at 201-07.

84. Power refers to "the endeavour by the parties to use the resources available to them that afford each some negotiating strength and a means of exercising persuasion and coercion upon the other." *Id.* at 187.

85. Potential power is defined as "the various resources available to each party

material (e.g., property, money) and to normative or symbolic resources (e.g., the husband attempts to increase his persuasive strength by defending his claims, interests, or behaviour on the grounds that it conforms with "rules and values that are taken to be axiomatic and/or to represent the acknowledged social order"⁸⁶ (e.g., a man's home is his castle, wives ought to obey their husbands, wife-beating is justified under some conditions)).

A society characterized by gender inequality, one differentiated and stratified by gender and supporting an institutionalized ideology justifying male domination in all socially significant contexts (educational, political, economic, religious, military), is a society that routinely provides husbands with greater resources than wives.⁸⁷ Gender inequality, then, is the societal context for the processing of marital conflicts. Mediation, like adjudication, is influenced by the social context in which it takes place; mediators "must construct an outcome in the light of the social and cultural context [in which mediation takes place]."⁸⁸

To the extent that this is true, a society characterized by male dominance should produce mediation agreements and court ordered settlements which reflect male biases. McLindon has provided evidence that this is true of adjudicated settlements;⁸⁹ the National Center on Women and Family Law has done the same for mediation agreements.⁹⁰ Evidence from other studies indicates that the feminization of poverty is associated with the processes of separating and divorcing.⁹¹ Sexist biases, when combined with a professionally enjoined neutral stance, may help produce mediation agreements which are a greater economic disaster for women than the negotiated agreements produced by lawyers, whose sexist biases may be muted by the economic and personal biases of the clients who pay them.

in negotiations . . . resources that provide a possible basis for action." *Id.* at 201 (emphasis omitted).

86. *Id.* at 192. See also Michael D. Smith, Patriarchal Ideology and Wife Beating: Evidence from a Survey of Toronto Women (1988) (report to the Ontario Women's Directorate, Toronto).

87. See Varda Burstyn, *Masculine Dominance and the State*, in *Women, Class, Family and the State* 45, 45-50 (Varda Burstyn & Dorothy Smith eds. 1985).

88. William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *Law & Soc'y Rev.* 63, 74 (1974).

89. See James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 *Fam. L.Q.* 351 (1987).

90. National Center on Women and Family Law (presentation at the 14th National Conference on Women and the Law, Washington D.C., April 10, 1983).

91. McLindon, *supra* note 89, at 391-95. See also Sylvia Ann Hewlett, *A Lesser Life* 51-69 (1986); Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* 323-56 (1985).

Men usually earn more money and possess more property than the women from whom they are separating or whom they are divorcing.⁹² These economic inequalities characterize the majority of couples served by mediators. In addition to inequalities in economic resources, one may have to consider inequalities in fear (of the other spouse and of the process) and in apparent "ignorance" of family finances. The emotional impact of unfamiliarity with the rules, procedures, and matters of substance pertaining to the marital conflict resolution process may also be important considerations.⁹³ As Walker, among others, has pointed out, husbands who dominate their wives or who use or threaten to use force as a tool of coercion are far more likely than other husbands to induce low self-esteem and a sense of helplessness in their wives.⁹⁴ Low self-esteem and learned helplessness lead many women to withdraw into themselves and to come to believe derogatory comments their husbands make about them.⁹⁵ Eventually, most women experiencing this kind of domination do not stay in the relationship; they leave.⁹⁶ It is not unreasonable to suggest that these women would find it especially difficult to sit face-to-face as equals with their ex-partners in mediation sessions.

Taken together, inequalities between husbands and wives tend to influence women to sign mediation agreements leaving them with custody of the children but which do not necessarily leave them better off financially than they would have been had they hired lawyers.⁹⁷ Although many women prefer to live in poverty with their children rather than continue in unhappy marriages, these same women are likely, for financial reasons, to become economically dependent on the next man with whom they become involved or to return to their husbands who may have abused them. Women who are more financially secure are less

92. See Weitzman, *supra* note 91, at 323-43; Ellen Gray, Attitudes and Ideological Orientations of Mediators 7 (paper presented at LaMarsh Research Programme on Violence and Conflict Resolution Seminar, York University, North York, Ontario, April 1988).

93. Ellis & Wight, *supra* note 70, at —.

94. Lenore E. Walker, *The Battered Woman Syndrome Study*, in *The Dark Side of Families: Current Family Violence Research* 31, 42-43 (David Finkelhor, Richard J. Gelles, Gerald T. Hotaling & Murray A. Straus eds. 1983).

95. See Randall Collins, *Sociological Insight: An Introduction to Nonobvious Sociology* 69 (1982) (subjection to coercion and constant brutality causes people to "withdraw . . . within a shell" and "makes them appear to be stupid").

96. M.D. Schwartz, *Marital Status and Spousal Violence Theory* (paper presented at the annual meeting of the Academy of Criminal Justice Sciences, St. Louis, Missouri, March 1980).

97. See Richardson, *supra* note 40, at 33. In this study, Richardson also reports that "divorce mediation does not in general have a positive impact on compliance with maintenance orders." *Id.*

likely to have to do this.⁹⁸ A number of studies have shown that economic dependence facilitates woman abuse.⁹⁹ Thus, the greater the number of women whose separation/divorce leaves them poorer and with dependent minors, the greater will be the number of women who become economically dependent on men. The greater the number of women who are economically dependent on men, *ceteris paribus*, the higher the rate of woman abuse. A neutral mediator, one who does not help empower women to help themselves rectify existing or future inequalities, makes an indirect contribution to woman abuse by helping to feminize poverty among separating and divorcing women.

Some scholars do view mediation as an empowering process, a process in which the mediator "exploit[s] mediation's innate ability to address power imbalances" in such a way as to support the spouse with weaker persuasive strength.¹⁰⁰ The same scholars also insist upon the neutrality of the mediator.¹⁰¹ These authors leave unclear how they would resolve this contradiction in practice.¹⁰² Other scholars, such as Folberg and Taylor, suggest that mediation is inappropriate where "inequality is a permanent condition or one that cannot be effectively dealt with in mediation—such as physical abuse or intimidation, a total disparity in financial sophistication, [or the] significantly lower intelligence of one participant" ¹⁰³ In light of presently available evidence, this would appear to be good advice.

For mediators in private practice, however, this advice must be weighed against the economic consequences of decreasing the pool of eligible clients by increasing the number of reasons for excluding couples from mediation. In a recent survey of private mediators, almost all indicated they would mediate for all couples who could pay them.¹⁰⁴ This hints at the link between economic realities and professional advice. Some supporters of mediation believe that "the economic circumstances in which the lawyer-client

98. *For Richer, For Poorer* (Canadian Film Board 1986).

99. See, e.g., Debra S. Kalmuss & Murray A. Straus, *Wife's Marital Dependence and Wife Abuse*, 44 J. Marriage & Fam. 277 (1982); Michael J. Strube & Linda S. Barbour, *The Decision to Leave an Abusive Relationship: Economic Dependence and Psychological Commitment*, 45 J. Marriage & Fam. 785 (1983).

100. Davis & Salem, *supra* note 64, at 18.

101. *Id.* at 19.

102. *Id.* at 24 (identifying six conditions under which it is appropriate to terminate mediation).

103. Folberg & Taylor, *supra* note 20, at 185.

104. Gray, *supra* note 92, at 26 (Of ten mediators surveyed, eight would take all clients who could pay, including "clients who abuse alcohol and drugs, [who had] beaten wives while married and . . . who beat their wives during the process of mediation.").

relationship is embedded" cause strains between lawyer and client which may adversely influence the processing of their case.¹⁰⁵ The same criticism may apply to mediators.

As a process, marital conflict mediation puts a premium on the possession by each spouse of relevant knowledge, of communication and bargaining skills, and of feelings of security and self-confidence requisite to using their knowledge and skills to reach, via compromise and cooperation, an agreement which will ensure the best possible set of post-separation outcomes for all concerned. For couples who possess these resources to an equal degree, mediation may be less harmful or more harmful than negotiation and litigation; mediation offers no guarantees. All too frequently, however, spouses are not equal in their persuasive strengths. When combined with the neutrality of mediators, the greater persuasive strength of husbands gives them freer rein to obtain the kind of agreement they want. To the degree to which such agreements further impoverish wives and their children and make them economically dependent on men with whom they cohabit, mediation facilitates woman abuse.

Pre-Separation Violence

A number of scholars contend that, instead of solving the problem of abuse of married and separated women, mediation may actually increase the risk of violence directed against them by their partners.¹⁰⁶ This is most likely to happen where the woman has already experienced physical abuse during her marriage.¹⁰⁷ Past violence is a good predictor of future violence;¹⁰⁸ violence theory and research support the scholars' contention.¹⁰⁹ Well over half of the women who seek to separate from and/or divorce their husbands include physical abuse among the reasons given for their decision.¹¹⁰ Given this, one would *expect* mediators to be sensi-

105. *Professional Intervention*, *supra* note 18, at 267. In much of the literature critical of lawyers, lawyers are described in unidimensional-adversarial terms that bear little relation to the variability of lawyer roles or stances one discovers in practice. *But see Contribution of Lawyers*, *supra* note 18; I. Sylvan Brown, *Good Lawyers Needn't be Gladiators*, *Fam. Advoc.*, Spring 1984, at 4 (1984).

106. *See, e.g.*, Lerman, *supra* note 4, at 86-87; Stallone, *supra* note 6, at 510-12.

107. *See* Lerman, *supra* note 4, at 86-87; Stallone, *supra* note 6, at 510-12.

108. John Monahan, *Predicting Violent Behavior: An Assessment of Clinical Techniques* (1981).

109. *See* Jeffrey A. Fagan, Douglas K. Stewart & Karen V. Hansen, *Violent Men or Violent Husbands?*, in *The Dark Side of Families: Current Family Violence Research* 52 (David Finkelhor, Richard J. Gelles, Gerald T. Hotaling & Murray A. Straus eds. 1983); Megargee, *supra* note 8, at 125.

110. *See* Michael David Freeman, *Violence in the Home: A Socio-Legal Study* 42-44 (1985). *See also* Linda MacLeod, *Wife Battering in Canada: The Vicious Circle* 20

tized to those problems.

Despite the fact that between one-half and three-quarters of the women who wish to separate may have been physically abused by their husbands, many mediators appear to have little interest in dealing with wife abuse as a significant problem in its own right.¹¹¹ In addition, violence as a "presenting problem" tends to be neglected in favour of the quest for its underlying causes.¹¹² Where these are deep or intractable, they tend not to be amenable to change.¹¹³ As a result, husbands who beat their wives during marriage may come to believe either that their violent habits do not present a serious problem or that little can be done to change them.¹¹⁴

Given the strength of the above arguments, one might entertain the possibility that the critics have overstated their case, that mediators take pre-separation wife abuse so seriously that they have developed "exclusion rules"¹¹⁵ covering wife abusers and have incorporated them into their professional codes of ethics. A review of all issues of *Family Law* published between 1980 and 1987 reveals *no* evidence of wife abusers being excluded from mediation.¹¹⁶ Actually, the absence of exclusion rules itself is notable. The implicit assumption seems to be that every separating couple can benefit from mediation.¹¹⁷ This assumption is clearly evident in the codes of ethics of such professional groups as the Ontario Association for Family Mediation.¹¹⁸

Permitting wife abusers to participate in mediation enhances

(1980) (Of 47,522 women requesting divorce applications in Canada in 1978, 2,800 applied for divorce on grounds of mental or physical cruelty only. In applications based on multiple grounds, 17,116 included physical cruelty.).

111. Report on Mediation in Family Law, *supra* note 75, at 78-80. In this report, mediation is deemed to be unsuitable for wives only when the past violence of their husbands has rendered them "incapable of negotiating." *Id.* at 80. Wives who have experienced violence, even severe violence, but who are assessed as being capable of negotiating are acceptable as candidates for mediating. For a more general analysis of this report, see Desmond Ellis, A Critical Analysis of the Attorney General's Advisory Committee Report on Mediation and Family Law (unpublished ms., LaMarsh Research Programme on Violence and Conflict Resolution, York University, Ontario, Canada).

112. Felstiner & Williams, *supra* note 42, at 224.

113. *See id.* at 237-39.

114. *See* Stallone, *supra* note 6, at 511.

115. These are rules identifying the conditions under which mediation is to be excluded because it is inappropriate. *See* Davis & Salem, *supra* note 64, at 24.

116. *See* Fam. L., vols. 10-17 (1980-1987).

117. *See id.* In this connection, see Mediation Rep. (March 1989). Here, the problem and prospects of mediating marital conflicts involving woman abuse is ignored.

118. *See* Ontario Association, *supra* note 42, at ii-xi.

their persuasive strength vis-à-vis their wives.¹¹⁹ Abused women are often timorous around their husbands. Timorous wives usually do not make good advocates for their own positions.¹²⁰ They tend to be neither forceful nor articulate in stating their legitimate claims to custody, support, and property when they must do so facing the men who have beaten them.¹²¹ The end result may be that they sign agreements which are economically disadvantageous. Difficult post-separation economic circumstances tend, as was noted earlier, to invite new relationships with men who abuse them.¹²²

Privacy Norms

The family, regarded as a prison for women by some scholars,¹²³ has been socially constructed as a "private domain."¹²⁴ Norms of privacy govern family relations in homes.¹²⁵ With respect to wife abuse, these norms function in the same way inmate codes operate in prisons.¹²⁶ For both beaten wives and inmates, reporting violence is "snitching"—a deviation from behavioral norms. These norms make wife abuse more probable by making the reporting of wife abuse to outsiders a form of deviance.¹²⁷ Pri-

119. This inference is based on the conceptualization of violence against women as a form of social control the effects of which are lasting and generalized across situations. In this connection, see Jalna Hanmer & Mary Maynard, *Women, Violence and Social Control* 6 (1987); Lenore E. Walker, *The Battered Woman* 148 (1979); Okun, *supra* note 12, at 113-39.

120. See Ellis & DeKeseredy, *supra* note 17, at —.

121. See Lerman, *supra* note 4, at 73, 90-91; Stallone, *supra* note 6, at 510.

122. See *supra* notes 97-105 and accompanying text.

123. See, e.g., Tove Stang Dahl & Annika Snare, *The Coercion of Privacy: A Feminist Perspective*, in *Women, Sexuality and Social Control* 8, 21-23 (Carol Smart & Barry Smart eds. 1978).

When I was doing research on violence in prisons, it soon became obvious that the "inmate code"—a set of rules enjoining self-help, no snitching to guards, loyalty to other inmates—served a number of functions. One of the most important of these was that it served the interests of inmates who ran the institution. An effective inmate code enabled them more fully to exploit, coerce, and beat up other inmates with little fear of punishment by prison staff. In an inmate social world conducted as "private," making a spectacle out of secrets by snitching to staff was a very serious form of inmate deviance. Very bad things would happen to snitches. Other potential snitches take such warnings seriously. A murder or a loss of an eye quite effectively reinforces inmate norms. Desmond Ellis, *Violence in Prisons* 48-90 (unpublished ms., Bethune College, York University, Ontario, 1986) [hereinafter *Violence in Prisons*].

124. The family is a private domain insofar as it is characterized by relative invisibility and self-help with respect to domestic disturbances, including violence against women. See Stang Dahl & Snare, *supra* note 123, at 12-14, 19-21.

125. See Jan Pahl, *Private Violence and Public Policy* 13-17, 186-91 (1985).

126. *Violence in Prisons*, *supra* note 123.

127. See Pahl, *supra* note 125, at 27.

vacy norms surrounding the family support and encourage wife abuse by keeping it a secret.¹²⁸

Mediators appear to be active supporters of family privacy norms. They invariably include confidentiality rules in their codes of ethics.¹²⁹ Although there are exceptions to this rule,¹³⁰ rarely, if ever, will a mediator report a male participant to the police for assaulting his wife—a criminal offence.¹³¹ While it is possible that wives do not tell mediators that they have been (or are being) physically abused, mediators seem to make no special effort to find out.¹³² In cases where they do discover wife abuse, they may tend to treat the matter as confidential.¹³³ So, in addition to abused wives not tending to report their abuse to the police, neither may mediators. Beyond supporting family privacy norms, mediators offer self-help solutions to husband-wife conflicts, such solutions being central to the process of mediation.¹³⁴ This combination of forces—privacy plus self-help—is as advantageous to wife abusers in homes as it is to violent inmate leaders in prisons.¹³⁵ As a whole process, mediation discourages both the reporting of wife abuse and active intervention by third parties to stop it.

Mediation does operate in “the shadow of the law” in the sense that family law and lawyers must be involved in determining the legal status of mediation agreements and also in enforcing them. However, the shadow of the law is not likely to extend to criminal law violations, such as assault, where a couple engages in a process which encourages them to work things out for themselves and to keep their abusive experiences a private matter—as if abuse were just another embarrassing or hurtful experience to be discussed privately (but openly) in the mediator’s presence.¹³⁶ Privacy norms surrounding the family are routinely mentioned as

128. *See id.* at 5-17, 186-91.

129. *See, e.g.,* Ontario Association, *supra* note 42, at iii-iv.

130. *Id.* at iv (exception to confidentiality rule “where the information discloses an actual or potential threat to human life or safety or a . . . breach of the [c]riminal [c]ode”).

131. In over four years of research on mediation, I have yet to hear of such a case.

132. *See* Quality of Life, *supra* note 72, at 51.

133. *See* Gray, *supra* note 92, at 17 (Of ten mediators surveyed, five indicated “that anything a mediator hears during [mediation] should never be revealed to anyone else without the permission of both [mediation participants].”).

134. Folberg, *supra* note 32, at 9 (“The ultimate authority in mediation belongs to the parties themselves . . .”).

135. In both contexts, it is useful to those who use violence to control others to have norms prescribing privacy and self-help. *See* Violence in Prisons, *supra* note 123.

136. *See* Stallone, *supra* note 6, at 512; Girdner, *supra* note 6.

supporting, if not encouraging, wife abuse.¹³⁷ In the reality of women's lives, they have a devastating effect.

Alcohol and Drugs

A number of studies have indicated that alcohol and drug abuse strongly correlate with both the likelihood and seriousness of violence in general and wife abuse in particular.¹³⁸ Some mediation programmes and some mediators do exclude husbands who abuse alcohol or drugs, but others do not.¹³⁹ Those that do not occasionally have to deal with participants who turn up for mediation sessions drunk or stoned.¹⁴⁰

Alcohol and drug abuse constitute what Felstiner and Williams might call "the deep end of maladaptations," those kinds of maladaptations that mediation is least likely to deal with effectively.¹⁴¹ When mediators do attempt to deal with them, they may inadvertently facilitate wife abuse.¹⁴² This is likely to occur when the mediation agreement becomes a "license to hit."¹⁴³ Consider "The Case of the Astute Mediator":

[H]e hits her when she nags, she nags when he drinks, he drinks to ease the pain of living and living is continually painful. While mediation cannot cope with his underlying dissatisfaction, an astute mediator may see that if she breaks the cycle by not nagging when he has been drinking, she may avoid the beatings which constitute the complaint which brought her to mediation. An agreement in such a case might specify that he agrees not to hit her and she agrees not to nag him. Such an agreement might work . . . because a mediator was alert to a feasible adjustment in a destructive cycle of interaction.¹⁴⁴

Here, the mediator regarded as "astute" by Felstiner and Williams has helped the couple sign an agreement which the husband could interpret in the following way: it's all right for me to hit her if she violates the agreement by nagging. If one kind of domestic deviance—her nagging—justifies his hitting her, then perhaps hitting her is also an appropriate response to other kinds of domestic deviance such as her failure to have meals ready on time, and so on. In

137. See Pahl, *supra* note 125, at 13-17, 188-91.

138. See, e.g., Quality of Life, *supra* note 72, at 36-37; but see Joseph Zacker & Morton Bard, *Further Findings on Assaultiveness and Alcohol Use in Interpersonal Disputes*, 5 Am. J. Community Psychology 373, 381-82 (1977).

139. See Felstiner & Williams, *supra* note 42, at 238; Stallone, *supra* note 6, at 506.

140. Felstiner & Williams, *supra* note 42, at 238.

141. See *id.* at 236-39, 243-44.

142. See *infra* notes 144-45 and accompanying text.

143. Straus, *supra* note 10, at 40 (coining the term "hitting license").

144. Felstiner & Williams, *supra* note 42, at 236.

describing an example of good mediation, Felstiner and Williams define her nagging *and* his beatings—a criminal offence—as merely “shallow end maladaptions.”¹⁴⁵

In this particular case, an astute mediator, if he/she were concerned with stopping the violence, would make further mediation contingent upon the male abuser's reliance on a non-violent way of dealing with the victim's nagging, and seeking professional help for his drinking problem, *and* making benefits of some kind contingent upon the use of more benign ways of relating to each other as husband and wife. One of the benefits could be a sliding reduction in mediation fees for couples who, during the course of mediation, refrain from criminal acts of violence and extreme provocation. In short, astute mediators would do more to demonstrate their astuteness by helping couples formulate agreements which, minimally, would clearly communicate that physical violence is legally and morally wrong, that punishment by legal authorities would be made contingent on further violence, and which would clearly identify alternate, non-violent ways of resolving disputes.

Summary and Conclusions

The transition from one marital status (married) to another (separated) does not mean the end of wife abuse for the women involved. Often, the abuse continues. According to a number of critics, mediating this transition does not routinely improve spousal relations, despite mediators' claims. Mediating marital conflicts may perpetuate abuse of participating wives. This happens because of power differences, pre-separation abuse, privacy norms, and drug and/or alcohol involvement. Power differences interact with an impartial mediator to increase the probability of abuse by males other than the husband. Pre-separation abuse tends to be associated with post-separation abuse because mediators do little to break the link between an abusive past and a violent future or to exclude pre-separation wife abusers from mediation. Privacy norms help keep wife abuse a secret. Secret wife abusers are neither deterred nor helped by outside intervention, including the intervention of mediators. Permitting husbands who abuse alcohol and/or drugs to participate in mediation helps increase the chances of post-separation abuse by providing opportunities and “reasons” for abuse.

Three major conclusions may be drawn from this paper.

145. *Id.*

First, post-separation woman assault is a serious matter, a criminal offence. It should be treated as such by mediators. Stopping the violence and/or attempting to decrease its future probability should be as important an objective as any other included in the lexicon of mediator goals. Where a criminal offence is involved, disclosure, rather than privacy norms, should govern mediator conduct.

Second, mediation is inappropriate in the presence of pre-separation abuse and alcohol and/or drug abuse.

Third, priority must be given to mediation as an empowering process where differences in persuasive strengths exist but are not so marked or ingrained as to vitiate the efforts made by wife-participants to help themselves. Where power imbalances are great and the woman thoroughly brow-beaten, mediation is inappropriate.

